**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MICHAEL B. ELDRIDGE**<br>Claimant | ) | |
| VS. | ) | |
| **KANSAS SAND & CONCRETE, INC.**<br>Respondent | ) | Docket Nos. 1,051,842<br>and 1,051,843 |
| AND | ) | |
| **WAUSAU UNDERWRITERS INS. CO.**<br>Insurance Carrier | ) | |

# ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 6, 2011, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on October 11, 2011. The Director appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. George H. Pearson, of Topeka, Kansas, appeared for claimant. James W. Fletcher, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant did not give respondent proper notice of his work-related accident of March 30, 2009, but did prove a series of accidental injuries from March 30, 2009, that aggravated his thoracic spine injury. The ALJ found that claimant's date of accident for his series of accidents was July 22, 2010, and that claimant gave respondent proper notice and proper written claim for that series of accidents. The ALJ found that claimant had a 10 percent functional disability and a permanent partial general disability of 70 percent based on a 40 percent task loss and a 100 percent wage loss.

The Board has considered the record and adopted the stipulations listed in the Award.

## ISSUES

Respondent asserts claimant did not meet with personal injury by accident on March 30, 2009; he failed to give respondent timely notice of the alleged accident; and he did not provide respondent with timely written claim. Respondent requests review of the ALJ's finding that claimant suffered a series of accidents with a date of accident of July 22, 2010. Respondent argues that asserting a repetitive trauma that is aggravating a previously unreported work-related accident is an attempt by claimant to bypass the timely notice and timely written claim provisions of the Kansas Workers Compensation Act. Respondent also asks that Dr. Prostic's opinion be disregarded because he did not separate his impairment rating or task loss opinion between the alleged single injury of March 30, 2009, and the alleged repetitive aggravation thereafter. Respondent contends claimant's alleged accident of March 30, 2009, is the sole basis for claimant's disability and any task loss claimant may have. And because there is no indication whether Dr. Prostic determined the task loss was due to the claimed series, respondent contends claimant failed to meet his burden of proving he is entitled to a work disability.

Claimant argues he proved he suffered a series of repetitive traumas with a date of injury of July 22, 2010, and that he gave proper notice and written claim of the series of accidents. Further, claimant contends the evidence is uncontroverted that he suffered a 10 percent functional disability and a 70 percent work disability based on a 100 percent wage loss and a 40 percent task loss. Accordingly, claimant asks that the Award of the ALJ be affirmed in its entirety.

The issues for the Board's review are:

(1) Did claimant suffer an accidental injury or a series of accidents and injuries that arose out of and in the course of his employment with respondent?

(2) Did claimant give respondent timely notice of his accident or series of accidents?

(3) Did claimant make timely written claim of his accident or series of accidents?

(4) What is the nature and extent of claimant's disability?

## FINDINGS OF FACT

Claimant filed an Application for Hearing on July 30, 2010, claiming an injury to his face and eyes because of concrete dust that had blown into his face. This case was designated as Docket No. 1,051,842. On the same day, claimant filed a second Application for Hearing, claiming injuries to his mid back when he "fell off [a] semi-truck when step broke and continuous aggravation of injury by jarring in broken seat on days

worked."[1] This case was designated as Docket No. 1,051,843. By Order of the ALJ, these two workers compensation cases have been consolidated and "[t]here is now only one case identified as Docket No. 1,051,843."[2] There was no evidence taken regarding the incident where concrete dust blew into claimant's face.

Claimant began working for respondent in August 2005 as a cement tanker driver. He testified that on March 30, 2009, the strap holding the step to the truck broke as he was climbing down, and he fell backwards about two feet, landing on the ground on his back and buttocks. Claimant testified he spoke with William Hollis, the dispatcher, and told him the step was broken and that he had fallen. He also claims he told Ed Busey, the lot man, about his fall. After the fall, claimant had pain in his mid back. He also testified he had muscle spasms in his back and down his legs.

Some time after his fall, claimant noticed the seat cushion in his truck[3] was worn down on the left side and was 2 to 3 inches lower than the right side. He said he had to sit at an angle while driving, and the bouncing and jarring was hurting his back. Claimant said he drove an average of 470 miles per day. Claimant testified he spoke with Tim Lohse, respondent's safety coordinator, in February 2010 and showed him the broken seat. He said he told Mr. Lohse the broken seat was hurting his mid back. On March 24, 2010, claimant wrote the seat up on the truck condition report, which he is required to fill out every day. He again wrote the seat up on the truck condition report on April 1, 2010, and May 3, 2010. Claimant said Jeff Starkebaum, who drove the same truck during the day shift, also complained about the seat. The seat was finally repaired in June 2010.

Mr. Starkebaum testified that in March 2009, claimant informed him that a strap holding the step onto the truck had broken, but claimant did not mention he had injured his back when the strap broke. He also testified that he and claimant had a conversation about the seat in their truck. Mr. Starkebaum said that the cloth over the seat was torn but the seat was not broken. He did not have any issues with the seat and did not fill out a truck condition report mentioning a problem with the seat.

Richard Varner is the head diesel mechanic for respondent. Mr. Varner received a report about the broken strap on the truck in March 2009. Claimant came over and talked to Mr. Varner about the broken strap. Mr. Varner did not remember if claimant told him he had fallen. However, he was not a person to whom employees would report an injury. Mr. Varner also received the report from claimant that a new seat cushion was needed in his truck because the foam in the cushion was worn out on one side and sat

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[1] Form K-WC E-1, Application for Hearing filed July 30, 2010.

[2] ALJ Order (Apr. 5, 2011) at 1.

[3] The truck with the worn cushion was the truck claimant normally drove while working. On March 30, 2009, he was driving a back-up truck because the truck he normally used was out of service.

lower by a couple inches than the other side. Mr. Varner did not recall claimant mentioning that the cushion was doing anything to him physically.

David Hollis is a dispatcher with respondent. He said the dispatcher on duty would be considered the drivers' supervisor. He said respondent's policy concerning on-the-job injuries is that the employee notify a supervisor, if one is available, fill out a workers compensation incident report, and turn the report in to the office. The first David Hollis became aware that claimant was alleging an on-the-job injury was in September 2010. At that time, he made a statement indicating that claimant did not report any injury to him in March 2009 or any other time in 2009.

David Hollis testified there were two dispatchers working for respondent in March 2009, he and William Hollis. He said William Hollis came in between 4:30 and 5 a.m. and worked until 8 or 8:30 a.m. David Hollis came in a 7 a.m. and worked until the end of the day, approximately 5 p.m. Claimant worked the night shift. He would start anytime between 6 to 8 p.m. and could work from 4 to 10 hours.

William Hollis is retired now but had been the assistant dispatcher at respondent. As dispatcher, he would be the drivers' immediate supervisor. But because claimant worked the night shift, he would have no supervisor at work most of the time. William Hollis was aware that a strap had broken on claimant's truck but denied claimant complained to him that he had injured his back by falling when the strap broke. William Hollis also knew there had been complaints about the seat on one of the trucks. He also heard claimant was complaining that the seat was hurting his back. He could not remember when he heard this, and claimant never personally complained to him that the seat was hurting his back.

Pam Tremblay is respondent's office manager. She stated that when employees are injured on the job, they are first to put it in writing and then are to report the injuries to the front office. Ms. Tremblay was not aware that claimant ever reported an injury to the front office. He did not report an injury to her, but she could not say whether an injury was reported to anyone else.

Timothy Lohse is the safety supervisor and coordinator at respondent. As safety manager, he deals with workers compensation injuries. In the event of an injury at work, respondent's policy is that an injury form needs to be completed and the injury reported to the front office. Mr. Lohse said claimant did not report an injury in regard to the strap breaking in March 2009. He was later made aware of claimant's allegations in regard to that incident but could not remember when he first knew.

Mr. Lohse originally became aware of the problem with the seat in claimant's truck from a conversation with claimant in May 2010. When claimant complained to Mr. Lohse about the seat cushion in his truck, he said it needed to be fixed and it was causing him back problems. Mr. Lohse did not tell claimant to fill out an accident report. Ordinarily he

would have told claimant to fill out a report, but he did not in this instance because claimant did not think he was hurt that badly.

Claimant first reported the seat cushion on a truck inspection report on March 24, 2010. It was not fixed until sometime after May 3, 2010. Mr. Lohse said there were several attempts to fix the seat. During that period, claimant would have been using the seat that he was complaining about.

Dan Woodward is the general manager and vice president of respondent. He first found out claimant was alleging he hurt his back on the truck's step when he received a letter from claimant's attorney dated July 30, 2010. It is Mr. Woodward's understanding that claimant is alleging the injury from the fall off the step was aggravated by the situation with the seat in his truck. Mr. Woodward visited with claimant and his ex-wife on May 28, 2010, about the issue with the seat, and the step incident was not mentioned. At that meeting, claimant told Mr. Woodward his back was hurting him, and Mr. Woodward asked claimant if he wanted to file a workers compensation claim. Claimant answered that he did. That was the first conversation Mr. Woodward had with claimant in regard to a workers compensation injury to his back. Claimant did not indicate to Mr. Woodward that the source of the back injury was the incident with the step of the truck. They only discussed the broken seat. Mr. Woodward said the seat cushion was re-covered around the end of May or first of June, but claimant was not satisfied with that. Respondent then called Midwest Kenworth. It had a seat, so that seat was put in the truck. Mr. Starkebaum did not like that seat. Respondent then purchased an original seat for the truck. The new seat was put into the truck sometime in June 2010.

After his fall from the truck in March 2009, claimant was initially seen by his personal physician, Dr. Brian Gibson. There is nothing in the record that indicates when claimant first saw Dr. Gibson. Claimant was then referred to a chiropractor, Dr. Doug Frye, and also had epidural steroid injections from Dr. Florin Nicolae. After claimant's conversation with Mr. Woodward on May 28, 2010, he was referred to Dr. Dale Garnett. Claimant first saw Dr. Garnett on June 2, 2010. On July 22, 2010, claimant saw Dr. Garnett again, and at that time he was given physical restrictions and was taken off work.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on September 7, 2010, at the request of claimant's attorney. He reviewed claimant's medical records, took a history, and performed a physical examination. Claimant told him he was stepping off his semi and was on the bottom rung when the step broke and he fell backwards, injuring his spine. Claimant said he continued to work, but his back condition worsened from the jarring of a broken seat in the truck. Dr. Prostic said claimant did not mention to him that he had any muscle spasms with regard to his injury, specifically in his legs.

Claimant told Dr. Prostic that he had previous low back pain, and Dr. Prostic was aware that claimant was taken off work for a back injury in 2006. Claimant testified he

injured his low back 30 years ago, and the back problem in 2006 was just a flare-up of that previous injury. Dr. Prostic said claimant's weight was about 300 pounds at the time of his examination, but that would not directly have any bearing on his back. He said the people who have the most difficulty with low back distress are those who are the least conditioned. He further stated that not many people who are 100 pounds overweight are well-conditioned.

After his examination, using the AMA *Guides*,[4] Dr. Prostic rated claimant as having a 10 percent permanent partial impairment to the body as a whole on a functional basis that was directly attributable to the work-related accident claimant reported to Dr. Prostic. Dr. Prostic stated that because this was a repetitious injury rather than a single injury event, he believed the DRE model was insufficient, so he used the range of motion model and then discounted it for claimant's deconditioning. Dr. Prostic said he questioned whether to rate both the thoracic and lumbar spine or only one of the two. He believed both needed to be rated because he did not think the injury was confined to one area or the other.

Dr. Prostic testified that claimant should be restricted to lifting 35 pounds occasionally knee to shoulder; 15 pounds repetitiously. He should avoid frequent bending or twisting at the waist, forceful pushing or pulling, and use of vibrating equipment. He reviewed the task list of Dick Santner. Of the 20 tasks on the list, he opined that claimant is unable to perform 8 for a 40 percent task loss.

Claimant testified he still rode a motorcycle, but only for short distances. Dr. Prostic said claimant could ride a motorcycle for short distances on a consistent basis. He would expect if claimant is on a motorcycle for a long time, he would progressively get more stiff and sore because of the vibration, just as he would driving a truck or any other vehicle.

Dick Santner, a vocational rehabilitation counselor, met with claimant on October 25, 2010, at the request of claimant's attorney. He compiled a list of 20 tasks that claimant had performed in the 15-year period before his work-related accident. Claimant was unemployed at the time of the interview and his wage loss was 100 percent.

Claimant testified that in February 2011, he contacted Mr. Woodward about some problems he had been having with his health insurance. They discussed whether he could come back to work, and claimant returned but was only able to work until March 16 or 17. While he had been off work, his back pain had decreased, but when he returned the pain came back and was as severe as before he was taken off work. Claimant went back to see Dr. Gibson, who advised him not to go back to work because of his pain. Claimant said he told Mr. Lohse that he would not be coming back to work and has not worked since

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

mid-March 2011. In his deposition testimony, Mr. Woodward said he did not know the status of claimant's employment but said claimant could return to work if he wanted.

## PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In *Hanson*,[7] the Kansas Supreme Court stated that "the burden of proving [a claimant's] preexisting impairment as a deduction from total impairment belonged to respondent once [the claimant] had come forward with evidence of aggravation."

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the

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[5] K.S.A. 2010 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001). See also *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 357-58, 180 P.3d 590 (2008).

> rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be

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[8] *Id.* at 278.

[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 2010 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

> Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

## ANALYSIS

The onset of claimant's back symptoms was March 30, 2009, after he fell from the step of respondent's truck. Thereafter, claimant continued working for respondent, which required that he operate a truck with a worn and lopsided seat. The combination of sitting at an angle together with the bouncing and jarring of his body aggravated his back pain. The seat was not repaired until June 2010. This history was given by claimant to Dr. Prostic. Claimant also informed Dr. Prostic of prior back problems, but claimant said he had been without symptoms for quite awhile before the incident in 2009. Dr. Prostic also noted that claimant was overweight and deconditioned. This likely also contributed to claimant's back injuries that resulted from the truck driving. And these factors, along with claimant's prior back problems and preexisting degenerative spine condition likely made claimant's back more susceptible for reinjury. Nevertheless, Dr. Prostic related claimant's current back condition, his impairment of function, restrictions and task loss to the employment with respondent. Dr. Prostic further described claimant's injuries as a series, that is, a repetitious injury rather than a single event. Dr. Prostic's opinions are uncontroverted.

Respondent contends claimant's injury and resulting disability are the result of a single accident, specifically, the fall from the step on March 30, 2009. However, neither the testimony of claimant nor the medical evidence supports this contention. The opinion of the only medical expert to testify in this case, Dr. Prostic, is that claimant suffered a series of repetitive traumas. The Board finds claimant's current low back injury and disability is the result of a series of accidents that arose out of and occurred in the course of claimant's employment with respondent. Respondent presented no evidence of a preexisting impairment as required by K.S.A. 2010 Supp. 44-501(c).

Respondent disputes that claimant gave timely notice and timely written claim of his accident. Determining the date of accident for a series of cumulative traumas is controlled by K.S.A. 2010 Supp. 44-508(d). That statute provides that the factfinder should first look to the date the authorized physician took the claimant off work due to the condition or gave restrictions against performing the work which caused the condition. Here, claimant's first authorized physician was Dr. Garnett, whom claimant first saw on June 2, 2010. Dr. Garnett gave claimant restrictions and took claimant off work on July 22, 2010. Accordingly, the ALJ found July 22, 2010, to be the date of accident for the series. The Board agrees with the ALJ's finding.

The ALJ further found that claimant gave notice of his accident and injury no later than May 28, 2010, when he met Mr. Woodward and that claimant made written claim on July 30, 2010. The Board agrees with and affirms the ALJ's finding that based on an accident date of July 22, 2010, notice and written claim were timely. Finally, the Board agrees with and affirms the ALJ's findings that claimant's percentage of functional impairment and percentage of task loss should be based upon the uncontradicted testimony of Dr. Prostic. As of the date claimant stopped working, claimant's work disability is the average of his 40 percent task loss and his 100 percent wage loss, for a 70 percent permanent partial disability. As stated, respondent has not established a right to any credit or offset against the permanent partial disability award based upon a preexisting impairment of function.

## CONCLUSION

(1) Claimant suffered a series of accidents and injuries that arose out of and in the course of his employment with respondent.

(2) Based upon an accident date of July 22, 2010, claimant gave timely notice for his series of accidents.

(3) Based upon an accident date of July 22, 2010, claimant gave timely written claim for his series of accidents.

(4) As a result of his series of accidents and cumulative traumas, claimant sustained a 10 percent permanent impairment of function and a 40 percent loss of his former job tasks. Beginning March 18, 2011, claimant's wage loss is 100 percent, for a 70 percent work disability.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated July 6, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
James W. Fletcher, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge